

FERMILAB FIXED PRICE SUPPLY SUBCONTRACT TERMS & CONDITIONS

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1. CHANGES

1.1 Fermilab may at any time, by a written order, and without notice to the sureties, if any, make changes within the general scope of this subcontract in any one or more of the following:

- (a) drawings, designs or specifications when the supplies to be furnished are to be specially manufactured for Fermilab in accordance with the drawings, designs or specifications.
- (b) method of shipment or packing.
- (c) place of delivery.

1.2 If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this subcontract, whether or not changed by the order, Fermilab shall make an equitable adjustment in the subcontract price, the delivery schedule, or both, and shall modify the subcontract.

1.3 The Subcontractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if Fermilab decides that the facts justify it, Fermilab may receive and act upon a proposal submitted before final payment of the subcontract.

1.4 If the Subcontractor's proposal includes the cost of property made obsolete or excess by the change, Fermilab shall have the right to prescribe the manner of the disposition of the property.

2. REPORTS AND RECORDS

2.1 The Subcontractor shall make such reports to Fermilab and maintain such records with respect to the Subcontractor's activities under this subcontract as Fermilab may require from time to time.

3. PAYMENT

Payment will be made after acceptance by Fermilab and receipt of a proper invoice. Discount time will be computed from date of delivery at place of acceptance or from receipt of proper invoice at the office specified by Fermilab, whichever is later. Payment is made, for discount purposes, when check is mailed.

4. INSPECTION OF SUPPLIES

4.1 Definition. "Supplies," as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

4.2 The Subcontractor shall provide and maintain an inspection system acceptable to Fermilab covering supplies under this subcontract and shall tender to Fermilab for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Subcontractor to be in conformity with subcontract requirements. As part of the system, the Subcontractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to Fermilab during subcontract performance and for as long afterwards as the subcontract requires. Fermilab may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the subcontract work. The right of review, whether exercised or not, does not relieve the Subcontractor of the obligations under the subcontract.

4.3 Fermilab has the right to inspect and test all supplies called for by the subcontract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. Fermilab shall perform inspections and tests in a manner that will not unduly delay the work. Fermilab assumes no contractual obligation to perform any inspection and test for the benefit of the Subcontractor unless specifically set forth elsewhere in this subcontract.

4.4 If Fermilab performs inspection or test on the premises of the Subcontractor or a sub-subcontractor, the Subcontractor shall furnish, and shall require sub-subcontractors to furnish, at no increase in subcontract price, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the subcontract, Fermilab shall bear the expense of Fermilab inspections or tests made at other than the Subcontractor's or sub-subcontractor's premises; *provided*, that in case of rejection, Fermilab shall not be liable for any reduction in the value of inspection or test samples.

4.5 (a) When supplies are not ready at the time specified by the Subcontractor for inspection or test, Fermilab may charge to the Subcontractor the additional cost of inspection or test.

(b) Fermilab may also charge the Subcontractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

4.6 Fermilab has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with subcontract requirements. Fermilab may reject nonconforming supplies with or without disposition instructions.

4.7 The Subcontractor shall remove supplies rejected or required to be corrected. However, Fermilab may require or permit correction in place, promptly after notice, by and at the expense of the Subcontractor. The Subcontractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

4.8 If the Subcontractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, Fermilab may either (a) by subcontract or otherwise, remove, replace, or correct the supplies and charge the cost to the Subcontractor or (b) terminate the subcontract for default. Unless the Subcontractor corrects or replaces the supplies within the delivery schedule, Fermilab may require their delivery and make an equitable price reduction.

4.9 Fermilab shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the subcontract. Fermilab failure to inspect and accept or reject the supplies shall not relieve the Subcontractor from responsibility, nor impose liability on Fermilab, for nonconforming supplies.

4.10 Inspections and tests by Fermilab do not relieve the Subcontractor of responsibility for defects or other failures to meet subcontract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the subcontract.

4.11 If acceptance is not conclusive for any of the reasons in paragraph 4.10 hereof, Fermilab, in addition to any other rights and remedies provided by law, or under other provisions of this subcontract, shall have the right to require the Subcontractor (a) at no increase in subcontract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Subcontractor's plant at Fermilab's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Subcontractor and Fermilab; *provided*, that Fermilab may require a reduction in subcontract price if the Subcontractor fails to meet such delivery schedule, or (b) within a reasonable time after receipt by the Subcontractor of notice of defects or nonconformance, to repay such portion of the subcontract as is equitable under the circumstances if Fermilab elects not to require correction or replacement. When supplies are returned to the Subcontractor, the Subcontractor shall bear the transportation cost from the original point of delivery to the Subcontractor's plant and return to the original point when that point is not the Subcontractor's plant. If the Subcontractor fails to perform or act as required in (a) or (b) above and does not cure such failure within a period of 10 days (or such longer period as Fermilab may authorize in writing) after receipt of notice from Fermilab specifying such failure, Fermilab shall have the right to contract or otherwise to replace or correct such supplies and charge to the Subcontractor the cost occasioned Fermilab thereby.

5. WARRANTY

5.1 Subcontractor warrants: All supplies, materials, and related services, hereinafter called "supplies", furnished under this subcontract will conform to the specifications and all other requirements of this subcontract and will be free from defects in material or workmanship.

5.2 Such warranties together with Subcontractor's service warranties and guarantees, if any, shall survive inspection, tests, acceptance of and payment for the supplies and shall run to Fermilab, its successors and assigns. The Subcontractor shall, within a reasonable time after receipt of written notice thereof, repair or replace, at its own expense, including transportation costs, if any, and without cost to Fermilab, any defects in materials or workmanship or nonconformance with specifications which may appear during the period ending on a date twelve months after initial use or eighteen months after delivery, whichever is earlier, unless a different warranty period is provided in this subcontract. If, within a reasonable time, Subcontractor is unable or refuses to correct or replace such defective or nonconforming supplies, Fermilab may, at

its option, either return for credit or may by subcontract or otherwise repair or replace such supplies and assess Subcontractor the cost occasioned thereby. The rights and remedies of Fermilab provided in this clause are in addition to and do not limit any rights afforded to Fermilab by law or by any other clause of this subcontract.

5.3 If the specifications provide for the furnishing of designs by the Subcontractor, the Subcontractor shall have complete responsibility for the adequacy of designs to meet performance requirements.

6. RESPONSIBILITY FOR SUPPLIES

6.1 Title to supplies furnished under this subcontract shall pass to the Government upon formal acceptance, regardless of when or where Fermilab takes physical possession, unless the subcontract specifically provides for earlier passage of title.

6.2 Unless the subcontract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the Subcontractor until, and shall pass to Fermilab upon –

- (a) delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
- (b) acceptance by Fermilab or delivery of the supplies to Fermilab at the destination specified in the subcontract, whichever is later, if transportation is f.o.b. destination.

6.3 Paragraph 6.2 above shall not apply to supplies that so fail to conform to subcontract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the Subcontractor until cure or acceptance. After cure or acceptance, paragraph 6.2 above shall apply.

6.4 Under paragraph 6.2 above, the Subcontractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of Fermilab acting within the scope of their employment.

7. TERMINATION FOR CONVENIENCE OF FERMILAB

7.1 Fermilab may terminate performance of work under this subcontract in whole or, from time to time, in part if it determines that a termination is in Fermilab's interest. Fermilab shall terminate by delivering to the Subcontractor a Notice of Termination specifying the extent of termination and the effective date.

7.2 After receipt of a Notice of Termination, and except as directed by Fermilab, the Subcontractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

- (a) Stop work as specified in the notice.
- (b) Place no further sub-subcontracts or orders (referred to as sub-subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the subcontract.
- (c) Terminate all sub-subcontracts to the extent they relate to the work terminated.
- (d) Assign to Fermilab, as directed by Fermilab, all right, title, and interest of the Subcontractor under the sub-subcontracts terminated, in which case Fermilab shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.
- (e) With approval or ratification, to the extent required by Fermilab, settle all outstanding liabilities and termination settlement proposals arising from the termination of sub-subcontracts; the approval or ratification will be final for purposes of this clause.

- (f) As directed by Fermilab, transfer title and deliver to Fermilab (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the subcontract had been completed, would be required to be furnished to Fermilab.
- (g) Complete performance of the work not terminated.
- (h) Take any action that may be necessary, or that Fermilab may direct, for the protection and preservation of the property related to this subcontract that is in the possession of the Subcontractor and in which Fermilab has or may acquire an interest.
- (i) Use its best efforts to sell, as directed or authorized by Fermilab, any property of the types referred to in subparagraph (f) above; *provided*, however, that the Subcontractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, Fermilab. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by Fermilab under this Subcontract, credited to the price or cost of the work, or paid in any other manner directed by Fermilab.

7.3 After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Subcontractor may submit to Fermilab a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by Fermilab. The Subcontractor may request Fermilab to remove those items or enter into an agreement for their storage. Within 15 days, Fermilab will accept title to those items and remove them or enter into a storage agreement. Fermilab may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

7.4 After termination, the Subcontractor shall submit a final termination settlement proposal to Fermilab in the form and with the certification prescribed by Fermilab. The Subcontractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by Fermilab upon written request of the Subcontractor within this 1-year period. However, if Fermilab determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Subcontractor fails to submit the proposal within the time allowed, Fermilab may determine, on the basis of information available, the amount, if any, due the Subcontractor because of the termination and shall pay the amount determined.

7.5 Subject to preceding paragraph 7.4, the Subcontractor and Fermilab may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph 7.5 or paragraph 7.6 below, exclusive of costs shown in subparagraph 7.6 (3) below, may not exceed the total subcontract price as reduced by (a) the amount of payments previously made and (2) the subcontract price of work not terminated. The subcontract shall be amended, and the Subcontractor paid the agreed amount. Paragraph 7.6 below shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

7.6 If the Subcontractor and Fermilab fail to agree on the whole amount to be paid because of the termination of work, Fermilab shall pay the Subcontractor the amounts determined by Fermilab as follows, but without duplication of any amounts agreed

on under paragraph 7.5 above:

- (1) The subcontract price for completed supplies or services accepted by Fermilab (or sold or acquired under subparagraph 7.2 (i)) not previously paid for, adjusted for any saving of freight and other charges.
- (2) The total of –
 - i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph 7.6 (1) above;
 - ii) The cost of settling and paying termination settlement proposals under terminated sub-subcontracts that are properly chargeable to the terminated portion of the subcontract if not included in subdivision (i) above; and
 - iii) A sum, as profit on subdivision (i) above, determined by Fermilab under 49.202 of the Federal Acquisition Regulation, in effect on the date of this subcontract, to be fair and reasonable; however, if it appears that the Subcontractor would have sustained a loss on the entire subcontract had it been completed, Fermilab shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.
- (3) The reasonable costs of settlement of the work terminated, including –
 - i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
 - ii) The termination and settlement of sub-subcontracts (excluding the amounts of such settlements); and
 - iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory

7.7 Except for normal spoilage, and except to the extent that Fermilab expressly assumed the risk of loss, Fermilab shall exclude from the amounts payable to the Subcontractor under paragraph 7.6 above, the fair value, as determined by Fermilab, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to Fermilab or to a buyer.

7.8 The cost principles and procedures of Part 31 of the Federal Acquisition Regulation, in effect on the date of this subcontract, shall govern all costs claimed, agreed to, or determined under this clause.

7.9 In arriving at the amount due the Subcontractor under this clause, there shall be deducted –

- (1) All unliquidated advance or other payments to the Subcontractor under the terminated portion of this subcontract;
- (2) Any claim which Fermilab has against the Subcontractor under this subcontract; and
- (3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Subcontractor or sold under the provisions of this clause and not recovered by or credited to Fermilab.

7.10 If the termination is partial, the Subcontractor may file a proposal with Fermilab for an equitable adjustment of the price(s) of the continued portion of the subcontract. Fermilab shall make any equitable adjustment agreed upon. Any proposal by the Subcontractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by Fermilab.

7.11 (1) Fermilab may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Subcontractor for the terminated portion of the subcontract, if Fermilab believes the total of these payments will not exceed the amount to which the Subcontractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Subcontractor shall repay the excess to Fermilab upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Subcontractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Subcontractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by Fermilab because of the circumstances.

7.12 Unless otherwise provided in this subcontract or by statute, the Subcontractor shall maintain all records and documents relating to the terminated portion of this subcontract for 3 years after final settlement. This includes all books and other evidence bearing on the Subcontractor's costs and expenses under this subcontract. The Subcontractor shall make these records and documents available to Fermilab, at the Subcontractor's office, at all reasonable times, without any direct charge. If approved by Fermilab, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

8. DEFAULT

8.1 (a) Fermilab may, subject to following paragraphs 8.3 and 8.4, by written notice of default to the Subcontractor, terminate this subcontract in whole or in part if the Subcontractor fails to –

- i) Deliver the supplies or to perform the services within the time specified in this subcontract or any extension;
- ii) Make progress, so as to endanger performance of this subcontract; or
- iii) Perform any of the other provisions of this subcontract.

(b) Fermilab's right to terminate this subcontract under subdivisions 8.1 (a) (ii) and 8.1 (a) (iii) above, may be exercised if the Subcontractor does not cure such failure within 10 days (or more if authorized in writing by Fermilab) after receipt of the notice from Fermilab specifying the failure.

8.2 If Fermilab terminates this subcontract in whole or in part, it may acquire, under the terms and in the manner it considers appropriate, supplies or services similar to those terminated, and the Subcontractor will be liable to Fermilab for any excess costs for those supplies or services. However, the Subcontractor shall continue the work not terminated.

8.3 Except for defaults of sub-subcontractors at any tier, the Subcontractor shall not be liable for any excess costs if the failure to perform the subcontract arises from causes beyond the control and without the fault or negligence of the Subcontractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in its sovereign capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Subcontractor.

8.4 If the failure to perform is caused by the default of a sub-subcontractor at any tier, and if the cause of the default is beyond the control of both the Subcontractor and sub-subcontractor, and without the fault or negligence of either, the Subcontractor shall not be liable for any excess costs for failure to perform, unless the sub-subcontracted supplies or services were obtainable from other sources in sufficient time for the Subcontractor to meet the required delivery schedule.

8.5 If this subcontract is terminated for default, Fermilab may require the Subcontractor to transfer title to the Government, and deliver to Fermilab as directed by it, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Subcontractor has specifically produced or acquired for the terminated portion of this subcontract. Upon direction of Fermilab, the Subcontractor shall also protect and preserve property in its possession in which the Government or Fermilab has an interest.

8.6 Fermilab shall pay the subcontract price for completed supplies delivered and accepted. The Subcontractor and Fermilab shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Fermilab may withhold from these amounts any sum it determines to be necessary to protect it against loss because of outstanding liens or claims of former lien holders.

8.7 If, after termination, it is determined that the Subcontractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of Fermilab.

8.8 The rights and remedies of Fermilab in this clause are in addition to any other rights and remedies provided by law or under this subcontract.

9. RESERVED

10. BUY AMERICAN ACT – SUPPLIES

10.1 DEFINITIONS. As used in this clause –

"Component" means any item supplied to Fermilab as part of an end item or of another component.

"Cost of components" means –

(1) For components purchased by the Subcontractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Subcontractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Domestic end product” means –

- (1) An unmanufactured end product mined or produced in the United States; or
- (2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

“End product” means supplies delivered under a line item of Fermilab subcontract.

“Foreign end product” means an end product other than a domestic end product.

“United States” means the 50 States, the District of Columbia, and outlying areas (see paragraph 1.2 of the FL-1).

10.2 The Buy American Act (41 U.S.C. 10a-10d) provides a preference for domestic end products for supplies acquired for use in the United States.

10.3 For a list of foreign articles that Fermilab will treat as domestic for this subcontract, see FAR 25.104

10.4 The Subcontractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled “Buy American Act Certificate.”

11. WALSH-HEALEY PUBLIC CONTRACTS ACT

11.1 If this subcontract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed \$10,000 and is subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45),

- (a) All stipulations required by the Act and regulations issued by the Secretary of Labor (41 CFR Chapter 50) are incorporated by reference. These stipulations are subject to all applicable rulings and interpretations of the Secretary of Labor that are now, or may hereafter, be in effect.

- (b) All employees whose work relates to this subcontract shall be paid not less than the minimum wage prescribed by regulations issued by the Secretary of Labor (41 CFR 50-202.2). Learners, student learners, apprentices, and handicapped workers may be employed at less than the prescribed minimum wage (see 41 CFR 50-202.3) to the same extent that such employment is permitted under Section 14 of the Fair Labor Standards Act (41 U.S.C. 40).

12. RESTRICTIVE LEGENDS

12.1 Subcontractor shall not, unless expressly authorized by this subcontract, furnish, supply or deliver any data that is of a proprietary nature, is a trade secret or bears a restrictive legend. Fermilab assumes no liability with respect to data delivered without express authorization.

13. PERMITS

13.1 Except as otherwise directed by Fermilab, the Subcontractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the State, territory, and political subdivision in which the work under this subcontract is performed.

14. ENVIRONMENTAL PROTECTION

In performing this subcontract, the Subcontractor shall comply with the requirements set forth in all applicable Federal and non-Federal environmental protection laws, codes, ordinances, Executive Orders, regulations, and directives.

15. EXTRAS

15.1 Except as otherwise provided in this subcontract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by Fermilab.